

1 JOHN S. LEONARDO
2 United States Attorney
3 District of Arizona

4 KRISTEN BROOK
5 Arizona State Bar No. 023121
6 JOSEPH E. KOEHLER
7 Arizona State Bar No. 013288
8 Assistant U.S. Attorneys
9 Two Renaissance Square
10 40 N. Central Ave., Suite 1200
11 Phoenix, Arizona 85004
12 Telephone: 602-514-7500
13 Email: kristen.brook@usdoj.gov
14 Email: joe.koehler@usdoj.gov
15 Attorneys for Plaintiff

16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Abdul Malik Abdul Kareem,

Defendant.

No. CR-15-00707-01-PHX-SRB

**GOVERNMENT'S CONSOLIDATED
RESPONSE DEFENDANT'S MOTION
FOR NEW TRIAL AND MOTION FOR
JUDGMENT OF ACQUITTAL**

The United States of America, through undersigned counsel, respectfully submits this opposition to defendant Kareem's motion for a new trial and motion for judgment of acquittal and asks the Court to deny both motions.

As a threshold matter, although the defendant's motion purports to identify nearly two dozen separate "discovery abuses," the defendant repeatedly omits or misstates key facts. For example, the defendant complains that the government didn't disclose his internet "browsing history" until midway through trial. In fact, complete images of the defendant's Lenovo and Acer laptop computers—which included each computer's browsing history—were disclosed to the defense in September 2015. The charts that the prosecution emailed to the defense during trial simply isolated this already-disclosed evidence. This is hardly a "discovery abuse." Separately, the defendant also raises

1 several complaints about the mid-trial production of interview reports. The defendant
2 fails to acknowledge, however, that the great majority of these reports concerned
3 interviews that had occurred just a few days earlier. In other words, the government
4 wasn't sand-bagging the defense with evidence that should have been disclosed months
5 earlier—to the contrary, the government was acting quickly to meet both the letter and
6 spirit of its discovery obligations by rapidly processing and producing new evidence soon
7 after it came into the government's possession.

8 Nor is there any merit to Kareem's assertion that the government disclosed "tens
9 of thousands of pages of documents, videos and other materials after trial started." (CR
10 303 at 6.) Many of the items delivered to the defense were simply reformatted versions
11 of items that had been previously disclosed. Some of the reformatting and re-disclosure
12 was done at the request of defense counsel. The few items that were truly new
13 disclosure, such as the FBI laboratory reports and interview reports, for the most part had
14 recently been created.

15 The defendant also seeks to characterize many of the alleged "discovery abuses"
16 as *Brady* violations. This tactic fails because the materials discussed in the defendant's
17 motion were not remotely exculpatory. The defendant was charged with being a member
18 of a conspiracy to launch an attack in Garland, Texas, and with being a member of a
19 separate conspiracy to provide material support to ISIL. The indictment alleged, and the
20 prosecution argued at trial, that the conspiracy was not limited to Simpson, Soofi, and
21 Kareem—the conspiracy involved others. Accordingly, the materials Kareem claims
22 pointed to involvement by others were not exculpatory. At most, these materials shed
23 light on the roles others may have played in the conspiracy, separate and in addition to
24 Kareem's role. They did not negate Kareem's guilt. The existence of other conspirators
25 does not negate a conspiracy charge.

26 Moreover, even assuming certain items disclosed after the Court-ordered *Brady*
27 deadline of October 12, 2015, might theoretically qualify as exculpatory, the delay in
28 disclosing those items did not prevent Kareem from receiving a fair trial. Defense

1 counsel used the items discussed in Kareem's motion effectively at trial by admitting
2 them as trial exhibits and using them in cross-examining witnesses.

3 Finally, and in any event, the defense could have requested additional time to
4 prepare but strategically chose not to do so. The appropriate remedy for a party who
5 feels aggrieved by the late disclosure of evidence is to seek a continuance. The trial in
6 this case began February 16, 2016, approximately nine and one-half months after the
7 failed terror attack in Garland on May 3, 2015. During that time, the FBI interviewed
8 hundreds of people in Garland, in Arizona, and elsewhere in the United States. Agents
9 executed numerous search warrants and recovered a large number of electronic devices
10 and physical evidence that had to be processed and analyzed in connection with the
11 investigation. Despite knowing the scope of the investigation, the amount of evidence
12 that was gathered, and the number of devices and other objects that were still undergoing
13 analysis, Kareem declined to seek a continuance (which would have provided additional
14 time to review evidence that was still arriving in significant quantities as the trial
15 approached) and instead demanded the speedy trial date set in this case. This was a
16 tactical choice, and now that this strategy has failed the Court should not afford the
17 defendant the remedy he forfeited – a continuance in the form of a new trial.

18 Background

19 In the parties' Joint Notice of Scheduling Order filed on July 31, 2015, the parties
20 agreed to an October 12, 2015 *Brady* disclosure deadline. It is important to emphasize
21 that "*Brady* disclosure" does not encompass *all* disclosure. Instead, it encompasses only
22 evidence that is material and exculpatory. In addition, footnote one of the scheduling
23 order made clear that the deadline applied only to evidence that was in the government's
24 possession as of October 12, 2015:

25 This deadline pertains to discovery within the government's possession and
26 control as of the date set for compliance. If additional records are discovered by,
27 or disclosed to, the government during pretrial preparation or otherwise, pursuant
28 to Rule 16(c), Fed. R. Crim. P., the government shall promptly disclose any
additional documentary evidence or materials to the defense as soon as practicable
after such disclosure or discovery occurs.

1 (CR 46 at 1 n.1.)

2 **A. Applicable Law**

3 The government's disclosures after October 12, 2015, including the disclosures
4 during trial, did not violate *Brady v. Maryland*, 373 U.S. 83 (1963). "The three elements
5 of a *Brady* violation are: (1) the evidence at issue must be favorable to the accused, either
6 because it is exculpatory, or because it is impeaching; (2) that evidence must have been
7 suppressed by the [government], either willfully or inadvertently; and (3) prejudice must
8 have ensued." *United States v. Kohring*, 637 F.3d 895, 902-903 (9th Cir. 2011) (citation
9 and internal quotation marks and alterations omitted).

10 Evidence is material if "there is a reasonable probability that, had the evidence
11 been disclosed to the defense, the result of the proceeding would have been different."
12 *Kohring*, 637 F.3d. at 903. "There is a 'reasonable probability' of prejudice when
13 suppression of the evidence 'undermines confidence in the outcome of the trial.'" *Id.* A
14 "reasonable probability" may be found even if the remainder of the evidence would have
15 been sufficient to convict the defendant. *Id.* The mere possibility that an item of
16 undisclosed information might have helped the defense or might have affected the
17 outcome of the trial does not establish "materiality" in the constitutional sense. *United*
18 *States v. Agurs*, 427 U.S. 97, 109-110 (1976). Further, the rule of *Brady* applies only to
19 information "unknown to the defense." *Id.* at 103.

20 To be material under *Brady*, the undisclosed evidence also must have been
21 admissible. *United States v. Sarno*, 73 F.3d 1470, 1505 (9th Cir. 1995); *United States v.*
22 *Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("Inadmissible evidence is by definition
23 not material [for *Brady* purposes], because it never would have reached the jury and
24 therefore could not have affected the trial outcome") (citation omitted).

25 A defendant alleging a *Brady* violation based on the late disclosure of evidence
26 also must show he was prejudiced by the delay. Thus, if a defendant is able to make
27 effective use of exculpatory or impeachment information that is disclosed mid-trial, no
28 *Brady* claim will lie. *United States v. Browne*, 829 F.2d 760, 765-66 (9th Cir. 1987)

1 (affirming denial of new-trial motion premised on untimely, mid-trial disclosure of *Brady*
2 material, and finding the evidence was still “of value” at the time it was disclosed;
3 evidence was not material because defense made effective use of it during cross-
4 examination and jury returned guilty verdict despite the impeachment.); *United States v.*
5 *Gordon*, 844 F.2d 1397 (9th Cir. 1988) (“*Brady* does not necessarily require that the
6 prosecution turn over exculpatory material before trial. To escape the *Brady* sanction,
7 disclosure ‘must be made at a time when disclosure would be of value to the accused.’”).

8 Finally, courts have recognized that a continuance—as opposed to a dismissal or
9 other severe sanction—is the best way to remedy any prejudice flowing from the late
10 disclosure of evidence. *See, e.g., United States v. Gamez*, 235 F.3d 453, 461-462 (9th
11 Cir. 2000) (affirming denial of motion to dismiss indictment for alleged *Brady* violation;
12 continuance provided ample time for the defense to prepare, so disclosure ultimately
13 “occurred at a time when it [was] of value to the accused”). In *United States v. Mathur*,
14 624 F.3d 498, 500, 506 (1st Cir. 2010), the court explained in detail why courts follow
15 “the general rule requiring parties [aggrieved by a late disclosure] to ask for
16 continuances.”

17 The customary remedy for a *Brady* violation that surfaces mid-trial is a
18 continuance and a concomitant opportunity to analyze the new information and, if
19 necessary, recall witnesses. The court offered precisely this remediation when the
20 [late-disclosed evidence] came to light, but the defendant repeatedly rejected the
21 proffered anodynes. ‘Generally, we have viewed the failure to ask for a
22 continuance as an indication that defense counsel was himself satisfied he had
sufficient opportunity to use the evidence advantageously.’ A fortiori, we can
draw a comparable inference from a defendant’s outright rejection of a proffered
continuance. Such a decision often will reveal, with conspicuous clarity, defense
counsel’s perception that the belatedly disclosed information was not critical to his
client’s defense. So it is here.”

23 *Id. See also United States v. Tarantino*, 846 F.2d 1384, 1417 (D.C. Cir. 1988) (*Brady*
24 production during trial reasonable because the defense had the opportunity to use the
25 materials); *United States v. Celis*, 608 F.3d 818, 836 (D.C. Cir. 2010) (*Giglio* disclosure
26 on first day of trial, which had to be processed during trial in light of extensive pretrial
27 disclosures, did not create *Brady* violation when record showed that counsel had been
28 able to conduct effective cross-examination). Thus, even if Kareem felt he did not have

1 an opportunity to use the materials, the remedy would not be a new trial. On discovering
2 helpful materials, Kareem could have – but did not – move for a continuance.

3 **B. Alleged Pre-Trial Discovery Abuses**

4 Kareem’s characterization of the government’s pretrial disclosures in this case as
5 “abuses” is unwarranted. As noted above, the Garland attack occurred the evening of
6 May 3, 2015. Officers from the Garland Police Department and FBI agents across the
7 United States immediately sprang into action in response to the attack, both to investigate
8 the people behind the attack and to ensure that no further attacks were imminent. In
9 addition to large quantities of physical evidence gathered at four different scenes (the
10 Garland crime scene; the Simpson/Soofi apartment; the Wittman, Arizona, shooting
11 practice scene; and the Kareem apartment) and at least five vehicles (the Soofi car in
12 Garland, Simpson’s car and Soofi’s van at their apartment, Kareem’s moving truck, and
13 Kareem’s Isuzu Ascender), agents recovered and analyzed approximately 27 electronic
14 devices in connection with the case. Of those 27 devices, the government listed 21 as
15 potential exhibits on its exhibit list and ultimately admitted 9 into evidence at trial. (Exh.
16 2.) The government also introduced particular pieces of evidence derived from four other
17 devices as exhibits at trial. Separately, FBI agents obtained records for numerous Twitter
18 and email accounts associated with Elton Simpson, Nadir Soofi, Kareem, and other
19 individuals who were investigated in connection with the case. The vast majority of the
20 electronic evidence gleaned from the various devices and electronic search warrants was
21 disclosed on two 1-terabyte hard drives on September 2, 2015, and a 1-terabyte thumb
22 drive on October 13, 2015—that is, in conformance with the *Brady* deadline specified in
23 the parties’ agreed-to scheduling order (although the order listed October 12 as the
24 deadline, the parties agreed that, because this date fell on a weekend, it could be extended
25 to October 13). Agents also discovered a large number of CDs and DVDs in the various
26 search locations.

27 The analysis of the electronic evidence was a labor- and time-intensive task that
28 continued into the trial of the case. Intelligence analysts reviewed various electronic

1 images of devices and flagged materials for additional review. They wrote Electronic
2 Communications (ECs) describing the things they located in the electronic evidence. The
3 analysts assisted special agents in drafting detailed reports describing the contents of
4 various electronic devices and the relevance of the contents to other evidence in the case.
5 For analysts who were called as witnesses in the case, their ECs covering the matters
6 about which they were to testify qualified as Jencks material and were disclosed to the
7 defense along with the special agent reports containing the more comprehensive analysis
8 of the devices.

9 Notwithstanding all of this, Kareem complains about pre-trial material disclosed
10 after the October 12, 2015 *Brady* disclosure deadline. His complaints lack merit. The
11 attached Discovery Matrix, Exhibit 1, tracks each of the defendant's allegations and the
12 government's disclosure in this case to illustrate the content of the disclosure and the time
13 the government provided it to Kareem. (Exh. 1). As the Matrix shows, the government
14 produced all reports and evidence to the defense in an orderly fashion that involved
15 sorting, numbering, and tracking each item of disclosure soon after it came into the
16 government's possession. The evidence was not *Brady* material and was, in any event,
17 provided in enough time for Kareem to make use of the it at trial.

18 **C. Alleged Trial Discovery Abuses**

19 Kareem raises a number of issues concerning the disclosure of reports and
20 witnesses during the trial. The witnesses about whom Kareem complains were on the
21 government's witness list, and their statements were all provided to the defense in
22 advance of their testimony. For many of the witnesses, the reports of their statements
23 that were provided during trial repeated previous disclosures or related to recent
24 interviews of those witnesses. The non-interview reports consisted primarily of forensic
25 laboratory reports that were finalized shortly before the trial, along with procedural
26 manuals, definitions and standards for analysis in the various FBI laboratories. Only two
27 of the laboratory experts, fingerprint analyst Kelli Edmiston and firearms tool mark
28 analyst Rodney Jiggetts, gave testimony in the case. Their testimony was largely

1 unremarkable. The rest of the forensic evidence in the case, to the extent it was relevant,
2 was the subject of stipulations at the end of the case.

3 Kareem also contends the government engaged in abusive discovery practices by
4 disclosing new exhibits during the trial. This claim is again unavailing. The exhibits that
5 the government marked during the trial (1) consisted of documents and other items that
6 had been disclosed to the defense well before the trial, (2) were derived from analysis
7 completed during or shortly before trial, or (3) became relevant during the trial based on
8 issues that arose for the first time during cross-examination of witnesses. The chart
9 attached as Exhibit 1 summarizes the content, dates of creation, dates of disclosure, and
10 in what form the items raised in Kareem's motion were disclosed. The discussion below
11 will focus on the reasons for the various additions of exhibits and disclosure of new
12 reports during the trial.

13 **1. Disclosure of James Bell Reports on February 18, 2016**

14 The government disclosed audio recordings of James Bell's May 5, 2015,
15 interviews on February 11, 2016. (Exh. 1 at 8.) Although Mr. Bell's name was on the
16 preliminary witness list filed by the government on January 8, 2016, Mr. Bell's interview
17 recordings inadvertently were not provided before February 11, 2016. On February 11,
18 2016, the defense alerted government counsel that reports relating to Bell's interviews
19 had not been disclosed. (Exh. 3, 2/11/16 5:33 p.m. Email from Mary Plomin).
20 Government counsel emailed the reports to defense counsel on February 18, 2016. Each
21 of the reports consisted of two pages, and none of Mr. Bell's statements was material.
22 The reports revealed Bell had very limited knowledge about events leading up to the
23 Garland attack and had little interaction with Kareem. (CR 303-1 p at 76-79, Def. Exh.
24 9.) Bell was not included on the Government's final witness list and did not testify
25 during the trial.

26 **2. Disclosure of Abdullah Mubarak Report on February 18, 2016**

27 The report of Abdullah Mubarak disclosed on February 18, 2016, was the second
28 disclosure of the same report which came from a pretrial interview of Mubarak conducted

1 on February 3, 2016. (Exh. 1 at 11.) The report for this interview was finalized on
2 February 8, 2016. On February 15, 2016, the Government disclosed a hard copy of the
3 report (Bates # 2469-71, CR 303-1 at 65.). The government disclosed the report again
4 via email on February 18, 2016 as described in the Defendant's motion.

5 The government provided earlier discovery regarding Mubarak, including audio of
6 his May 20, 2015 interview, disclosed on August 7, 2015 (Bates # 36). The transcript of
7 Mubarak's May 20, 2015 interview was disclosed on November 18, 2015 (Bates # 1112-
8 1174.) The Government disclosed Mubarak's June 10, 2015, interview on October 13,
9 2015, and again on November 18, 2015 (Bates # 389 & 1110-1111). On January 29,
10 2016, the Government disclosed Mubarak's November 30, 2015 interview (Bates # 1709-
11 1710.) Mubarak testified on February 19, 2016.

12 **3. Disclosure of Amy Vaughan's Upcoming Testimony on February 18,** 13 **2016**

14 Kareem correctly notes the government provided notice on February 18, 2016, of
15 its intent to call FBI Intelligence Analyst Amy Vaughan to testify the next day, February
16 19, 2016. IA Vaughan is not a computer forensic analyst; she is an intelligence analyst.
17 IA Vaughan previously testified during the hearing on the defense motion to suppress
18 evidence in the case, and the matters she covered in her testimony were disclosed on
19 January 29, 2016, as part of her ECs and SA Whitson's January 22, 2016, comprehensive
20 analytical report covering Kareem's electronic devices. IA Vaughan was listed on
21 Government's preliminary and final witness list in this case. The defense conducted an
22 extensive cross-examination of Ms. Vaughan on February 23, 2016 (RT 2/23/16 102-
23 134.)

24 **4. Disclosure of Amber Pluff Report on February 23, 2016**

25 On January 15, 2016, an FBI agent interviewed Amber Pluff. On February 3,
26 2016 the government disclosed the recording of the interview with Ms. Pluff. (Bates #
27 2291). (Exhibit 1 at 6) The 5-page report of the interview was finalized on February 8,
28 2016, and first disclosed on February 15, 2016 (Bates # 2484-88). Government counsel

1 disclosed the report of the interview again via email on February 22, 2016, and again in
2 hard copy form on February 23, 2016 (Bates # 2651-55). Ms. Pluff testified on February
3 23, 2016.

4 **5. Disclosure of N.S. Report on February 23, 2016**

5 The N.S. report disclosed on February 23, 2016 (Bates # 2901-2904), was a repeat
6 of the same disclosure on February 17, 2016 (Bates # 2590-2593), and related to a
7 pretrial interview of N.S. conducted on February 8, 2016. (Exhibit 1 at 9.) The report
8 was finalized February 14, 2016. The government previously disclosed the recording of
9 N.S.'s forensic interview on October 13, 2015 (Bates # 140) and the report of that
10 interview on January 29, 2016 (Bates # 2115-16).

11 **6. Disclosure of Efran Ochoa Report on February 23, 2016**

12 FBI agents interviewed Efran Ochoa on February 8, 2016, and finalized a report of
13 the interview on February 16, 2016. (Exhibit 1 at 14.) On February 21, 2016, defense
14 counsel requested the report via email. On February 23, 2016, the government disclosed
15 the interview report (Bates #2905-07) and the audio recording (Bates # 3221). Efran
16 Ochoa did not appear on either party's witness list (CR 294, 295) and did not testify
17 during the trial.

18 **7. Addition of Exhibits from Nextbook Tablet**

19 Kareem claims the government never produced a report discussing 10 of the 13
20 exhibits relating to the Nextbook tablet (mistakenly referred to as an RCA Nextbook
21 tablet). (CR 303 at 4.) Those items all were part of the extraction of the Nextbook tablet
22 that was disclosed on a hard drive on September 2, 2015, and again on a CD in the final
23 UFED Report on January 21, 2016 (Bates # 1636). At no point in her testimony did IA
24 Vaughan describe the exhibits as explicitly radical. The government offered the
25 Nextbook exhibits, Nos. 450-459 and 467-469, and they were admitted into evidence
26 without objection. (RT 2/23/16 94-99.)

27 The defense likewise complains about the lack of disclosure of a report of another
28 intelligence analyst who reviewed the Nextbook tablet, Jessica Maxwell. The Court

1 ordered disclosure of the report during the trial and the government complied; however,
2 IA Maxwell did not testify during the trial, and her report contained no exculpatory or
3 impeachment material. Further, IA Vaughan did not write her own EC but instead
4 assisted in drafting SA Whitson's final report on Kareem's devices that included the
5 Nextbook tablet. (RT 2/23/16 104.) IA Maxwell did not assist in the preparation of the
6 final report. (RT 2/23/16 104.) Therefore, IA Maxwell's EC was not subject to
7 disclosure as Jencks, *Brady* or *Giglio* material, and failure to disclose it prior to that time
8 did not violate any rule or case law.

9 **8. Disclosure of Intent to Play Certain Excerpts of Kareem's Interview**

10 Kareem contends the government "has never provided the defense with these
11 excerpts [of Kareem's June 10, 2015, post-arrest interview] to this day; however, the
12 defense did have the entire interview." (CR 303 at 5.) (See Exhibit 1 at 18.) This
13 assertion is false. The government provided a list of the start and stop times for each of
14 the individual exhibits that were excerpts of Kareem's post-arrest interview. (Exh. 4,
15 Email to Defense Counsel Dated February 29, 2016 12:27 p.m. and Attachment.) The
16 chart included the exhibit number, the clip name, and the start and stop times for each
17 exhibit. The recording of the interview (Bates # 011, disclosed August 7, 2015) and a
18 transcript of the interview (Bates # 934-1038, disclosed November 18, 2015) both were
19 disclosed well before trial.

20 **9. Disclosure of Unredacted Reports of Interviews of Juan and Carlos**

21 Kareem contends the government failed to disclose unredacted copies of reports
22 relating to interviews of Juan and Carlos in this case. (CR 303 at 5.) This assertion is
23 false. On August 7, 2015, the government disclosed the full, unredacted, audio and video
24 recordings of Juan and Carlos in the first discovery wave in the case (Bates # 1-2; Exh. 1
25 at 18-19.). In the same initial wave of discovery on the same date, the government
26 disclosed redacted reports of the interviews (Bates # 186-189). With few exceptions, the
27 redactions in the reports consisted of the child's name. In both reports, two additional
28 names were redacted: the name of the children's older brother, and "Stephan Verdugo,"

1 who at the time was a confidential source. In both cases, the redacted language was
2 merely the name of the person and did not include the content of the statement. In any
3 event, the unredacted audio and video recordings of each child's interview contained all
4 the information that had been redacted from the reports of the interviews.

5 On January 29, 2016, the government disclosed two additional reports relating to
6 Juan and Carlos: Juan's four-page report (Bates #1836-1839) and Carlos' six-page report
7 (Bates # 1840-1845). In Juan's report, the redactions consist of the child's name, four
8 references to his juvenile brother and three references to his older brother. In Carlos's
9 report, the redactions consist of the child's name and the names of his juvenile brother,
10 his nephew, and his other brother. Again, only the person's name itself was redacted, not
11 the content of the statement.

12 Finally, unredacted versions of the reports were hand-delivered to defense counsel
13 in court before the children took the stand on February 24, 2016.

14 **10. Jeffrey Evans Report and Exhibits**

15 Kareem lists the disclosure of reports and exhibits from FBI Computer Forensic
16 Analyst Jeffrey Evans among the "discovery abuses" the government allegedly
17 committed in the case. (CR 303 at 5.) Mr. Evans drafted the three page report
18 documenting his examination of 14 electronic items (Defendant's Exhibit 15) on
19 February 24, 2016, and the government disclosed it the same day. (Exh. 1 at 20-21.)

20 The extraction and analysis of the Hiren 15.1 CD (Trial Exhibit 200) was
21 conducted February 22-23, 2016. Mr. Evans produced a forensic report that included the
22 files on the CD and which was disclosed to the defense on a CD that could be read on an
23 ordinary computer with no additional software tools on February 23, 2016. (See defense
24 Exh. 15, 303-2 at2, Koehler email dated 2/24/16 referencing CD delivered "yesterday")

25 Following the extraction, Mr. Evans conducted a test run of the CD demonstrating
26 what a user would see if they "booted" a computer using the CD and then ran the
27 "shredder" program. The Hiren Boot CD Walk Through (Trial Exhibit 477) was a series
28 of seven pages of images containing screen shots from the test run. Only one of the

1 images had any extensive text on it. This exhibit was identical to the file titled
2 “QPX107_sample_run.pdf” that was attached to the email to defense counsel dated
3 February 24, 2015 9:16 p.m. (Defense Exh. 15, CR 303-2 p. 6-12)

4 The Hiren 15.1 CD Table of Contents (Trial Exhibit 473) originally was
5 produced as part of the forensic report on CD as well as via email. The report of
6 extraction of the CD was completed February 23, 2016, and hand-delivered to the
7 defense on February 23, 2016. The February 24, 2016, email merely included the same
8 table of contents in the format in which it was to appear as an exhibit in JERS.

9 Mr. Evans testified on February 25, 2015, and Exhibits 473 and 477 were admitted
10 into evidence that day. The defense requested and received an extension for the cross-
11 examination of Mr. Evans, and conducted the cross-examination on February 26, 2016.
12 (CR 292, 294)

13 **11. Kelli Edmiston Demonstrative Exhibit**

14 Kareem correctly notes the government sent an email on February 24, 2016,
15 containing an exhibit relating to Ms. Edmiston’s testimony the next day. (CR 303 at 5.)
16 The email was sent at 6:38 p.m., not 9:39 p.m. as Kareem alleges in his motion. (See
17 Exhibit 5, Email dated February 24, 2016 6:38 p.m.) The attachment was a single
18 powerpoint slide with two fingerprints side by side and arrows on each fingerprint
19 showing the points of comparison about which Ms. Edmiston was going to testify. The
20 slide was a demonstrative exhibit and was not admitted into evidence. (Exh. 1 at 21.)

21 The government disclosed reports from Ms. Edmiston shortly after they were
22 released. The report that was Ms. Edmiston’s final report relating to the case was
23 finalized February 12, 2016, was uploaded into the FBI’s Sentinel system on February
24 17, 2016, and disclosed in hard copy and on CD on February 18, 2016. Another report,
25 finalized January 30, 2016, was uploaded to Sentinel on February 9, 2016, and was
26 disclosed February 23, 2016. As Ms. Edmiston testified during the trial, she stopped
27 conducting fingerprint analysis in February 2016 in order to ship the items under
28 comparison back to Phoenix for use in the trial in this case.

1 **12. Re-disclosure of Internet Browsing History**

2 The internet browsing history was part of the disclosure of the Lenovo 2015 laptop
3 image on November 18, 2015. (Exhibit 1 at 22-23.) Government and defense counsel
4 had a discussion during a break in the courtroom. During the discussion it became clear
5 that it would assist defense counsel to have the internet browsing history in a separate file
6 in spreadsheet format in order to understand the snippets from that history that were
7 contained in SA Whitson's January 22, 2016, report (disclosed January 29, 2016)
8 analyzing Kareem's devices. Government counsel provided the spreadsheet file as a
9 courtesy to the defense; it was not new disclosure.

10 **13. Nextbook Images Analysis by Ms. Vaughan**

11 During Ms. Vaughan's testimony, the defense asked questions about the dates
12 certain images were created or downloaded on the Nextbook tablet. (RT 2/23/16 129-
13 130.) (Exhibit 1 at 22-23) Ms. Vaughan went back through the image of the Nextbook
14 and found metadata for some of those images that she could not recall during her cross-
15 examination. (RT 2/23/16 130-131, 133-134.) As with the internet browsing history
16 discussed above, the government disclosed the information she retrieved as a courtesy to
17 the defense.

18 **14. Acer Internet History Email**

19 Kareem correctly notes the government sent an email with a shortened version of
20 Acer Aspire laptop's internet history on February 25, 2016. (Exh. 1 at 29.) The
21 government previously had disclosed the full version of the Acer's internet history on
22 September 2, 2016, as part of its disclosure of the image of the Acer laptop. Relevant
23 items from the internet history were included in SA Whitson's January 22, 2016,
24 comprehensive analysis report regarding Kareem's electronic devices, which was
25 disclosed January 29, 2016. Agent Whitson testified regarding items from the Acer's
26 internet history on February 26, 2016. (RT 2/26/16 13, 44-46, 60-61.) The government
27 did not mark an exhibit setting forth the Acer's internet browsing history because the
28 browsing history was replete with irrelevant and highly-prejudicial material.

1 Government counsel had shown hard copies of the browsing history to defense counsel
2 during breaks in the trial in order to forewarn defense counsel about potential pitfalls in
3 cross-examining witnesses about the Acer's internet browsing history. (Defense Exh. 18,
4 CR 303-2 at 36) Government counsel sent the spreadsheet as a courtesy to enable
5 counsel more easily to search through it for specific items about which SA Whitson
6 would testify. The spreadsheet also was useful to assist counsel to find items that might
7 be useful in cross-examination without disclosing prejudicial material to the jury.

8 **15. Google Account History Email**

9 Kareem correctly notes the government sent an email on February 25, 2016, with
10 two exhibits containing excerpts from the Google account history for Kareem's account,
11 gitrdonemoving@gmail.com. (Exhibit 1 at 24-27.) The exhibits were excerpts of Exhibit
12 158, the full account history for the same email account. The excerpts were created in
13 response to questions to Ms. Vaughan that implied Kareem was not using the Acer laptop
14 or accessing the internet in May 2015. The government did not offer the excerpts
15 (Exhibits 482-485) or the full account history into evidence. This is discussed in more
16 detail below.

17 **16. Acer Network Access Log and Cell Phone Communications Email**

18 Kareem correctly notes the government sent an email on with an attachment
19 consisting of the Acer's network access log from January through May 2015. (Exhibit 1
20 at 25.) The email also had Kareem's cell phone communications with Simpson and Soofi
21 as well as his text history after the Garland attack.

22 Like the Gmail records above, the cell phone communications exhibit (Trial
23 Exhibit 478) contained summaries and portions of the cellular phone records for
24 Kareem's phone that were already contained in Exhibit 143. The post-attack text
25 messages were derived from disclosure of the full search warrant results for Kareem's
26 cell phone, which were disclosed to the defense on October 13, 2015 (Bates # 405). The
27 messages became relevant after the opening statement revealed the defense planned to
28

1 rely on post-attack communications and events to establish Kareem's state of mind in the
2 wake of the attack. (RT 2/17/16 27-28.)

3 The Acer network access log originally was disclosed as part of the Acer Aspire
4 image on September 2, 2015. Like the Google account history excerpts and the post-
5 attack text history from Kareem's phone, the access log became relevant during the cross-
6 examination of Ms. Vaughan, when defense counsel sought to create an inference that
7 Kareem's Acer Aspire laptop was not in use and did not have internet access in May-June
8 2015. Specifically, defense counsel asked whether Ms. Vaughan was aware agents did
9 not recover a modem during the search of Kareem's apartment, and did not recover a
10 power cord for the laptop. (RT 2/23/16 124.) This could have led to an inference that
11 Kareem was not using the Acer computer in the time leading to the attack as well as after
12 the attack. However, the access log revealed not only that the Acer was actively used
13 through the end of May 2015, but also that it was accessing the internet via Kareem's
14 Maxwest cell phone. Both of these facts also contradicted Kareem's trial testimony about
15 not having used the Acer since November 2014 (RT 3/9/16 144-145), so the Acer
16 network access log would have become a rebuttal exhibit even in the absence of the issue
17 arising during cross-examination of Ms. Vaughan.

18 **17. Addition of Exhibits 488-496**

19 Kareem correctly notes the government gave notice of its intent to offer exhibits
20 488-496 on Monday, February 29, 2016 (a non-trial day); however, the time was 4:37
21 p.m., not 9:15 p.m. (Exh. 6, Email dated 2/29/16 4:37 p.m.)

22 Exhibits 488-492 all came from the internet history from Kareem's Acer Aspire
23 laptop computer. (Exhibit 1 at 29.) Exhibit 493 was a transcript of the Battle of the
24 Hearts and Minds lecture. The lecture itself had been admitted into evidence on February
25 18, 2016. (CR 292, Exh. 390.) The image of Kareem's Acer laptop was disclosed
26 September 2, 2015, and IA Vaughan's EC and S/A Whitson's report summarizing the
27 findings of the search and analysis of the internet history from the Acer laptop was
28 disclosed January 29, 2016. The EC and report specifically identified visits to Hoor-al-

1 ayn.com (Bates 1654-56, 2049-51) and Kalamullah.com (Bates 1656, 1666, 2049, 2051,
2 2063-64). References to Anwar al-Awlaki on the Acer Aspire laptop, including the
3 Battle of the Hearts and Minds lecture and the YouTube web addresses for it, likewise
4 were described in IA Vauhan's EC and S/A Whitson's report (Bates # 1653-59, 1666-67,
5 1669, 2049-52, 2057-59, 2062-64, 2070, 2082-83). (Exh. 7, 8, 9.)

6 Exhibits 494 and 495 related to Simpson's Galaxy S5 phone having been used to
7 access a document, "ISHD leak.pdf," which was a release by the Islamic State Hacking
8 Division of personal information of U.S. military personnel that encouraged supporters to
9 harm the personnel identified on the list. The report of extraction of Simpson's Samsung
10 cell phone, which included the web history revealing searches for and access to the ISHD
11 leak document, was disclosed September 2, 2015. (Exh. 1 at 29.)

12 Exhibit 496 consisted of photocopies of the pages from the blue steno notebook
13 from the Simpson/Soofi apartment. Those copies of pages were disclosed on November
14 6, 2015 (Bates # 479). (Exh. 1 at 29.)

15 Exhibit 497 consisted of a photograph of Mohamed Abdullahi Hassan, aka
16 Mujahid Miski, a person with whom Elton Simpson communicated on Twitter. Search
17 warrant results from Twitter were disclosed October 13, 2015, and included all the
18 relevant communications offered into evidence during the trial. Reports analyzing the
19 Twitter and other communications between Simpson and Miski were disclosed January
20 29, 2016 (Bates 1672-74, 1887-1901). Exhibit 497 was a larger version of the same
21 image of Miski that appeared in exhibit 480. A Google search of Miski's name
22 immediately retrieves his Twitter user image that matches Exhibit 497.

23 **D. Alleged *Brady* Violations**

24 **1. Information About Ali Baiz & Christian Leon**

25 Kareem contends the government failed to disclose information about Baiz and
26 Leon until February 9, 2016, and that "it was impossible for the defense to investigate
27
28

1 these individuals or prepare a thorough defense.” (CR 303 at 7.) This allegation is
2 without merit for several reasons.

3 First, the reports concerning interviews of Baiz and Leon did not contain
4 exculpatory evidence. Contrary to the defense suggestion, nothing in the reports supports
5 the notion that Baiz or Leon sold any of the Garland weapons to Nadir Soofi.
6 Specifically, the firearm Baiz was selling was a Century Arms AK-47. This firearm did
7 not match either the Romarm/Cugir AK-47 that Elton Simpson used or the Elk River
8 Tool & Die AK-74 that Nadir Soofi used in the Garland attack. Meanwhile, Leon
9 informed the interviewing agents that he did not sell the AK-74 rifle about which he had
10 exchanged messages with Nadir Soofi. Thus, the information in the reports was not
11 exculpatory. In fact, the information contained in the 302s was inculpatory because it
12 showed efforts by Soofi to obtain firearms in January 2015. Those efforts were
13 consistent with the testimony of Ali Soofi about Nadir Soofi having acquired the AK-74
14 rifle with the defendant’s assistance in January 2015. (RT 3/2/16 29.)

15 Second, the defense possessed the information relating to Baiz and Leon in time to
16 make effective use of it at trial. Notably, the defense possessed this information earlier
17 than Kareem claims in his motion. The government disclosed the messages and
18 associated phone numbers that were the subject of the Baiz and Leon 302s in September
19 2015. (Exh. 10, Defense Trial Exhibit 543.) Moreover, the defense labeled and identified
20 Trial Exhibits 543-546, which identified the phone numbers and the relevant
21 communications set forth in the reports of Baiz and Leon. This was the precise
22 information the defense claims it needed in order to locate Baiz and Leon. In any event,
23 the defense received the reports and connected them to the text messages in time to make
24 use of them at trial. The defense marked the Baiz and Leon text messages as exhibits and
25 admitted some of them at trial during cross-examination of SA Whitson. (RT 3/3/16 SW
26 145-160; Trial Exhibits 544-546.)

1 Thus, the information was not *Brady* material, it already was in possession of the
2 defense, and the defense received the information in the reports in time to make effective
3 use of it at trial.

4 **2. Saabir Nurse**

5 Kareem relies on an indented letter (Trial Exhibit 553), the content of which was
6 admitted into evidence as Trial Exhibit 554, to argue that Saabir Aaqil Nurse was a
7 participant in the conspiracy to the exclusion of Kareem. (CR 303 at 8). Kareem claims
8 the note clearly indicates that Mr. Nurse provided funds to Simpson that Simpson
9 appeared to have used for terrorist activity, and that Simpson was paying Mr. Nurse back
10 by giving him Simpson's car. Kareem further claims any further investigation done by
11 the Government qualifies as *Brady* material. This is an inferential leap not supported by
12 the evidence. Notably, the defense listed Nurse as a trial witness but did not call him to
13 the stand.

14 On January 29, 2016, the Government disclosed Saabir Aaqil Nurse's two
15 interviews with the FBI. Mr. Nurse was interviewed by the FBI on May 4, 2015 and
16 again on May 21, 2015. Defendant listed a May 26, 2015 interview in his motion. That
17 interview took place May 21, 2015, and the report of the interview was drafted May 26,
18 2015. Defendant also refers to a May 6, 2015, interview; this is the date the report of the
19 May 4, 2015, interview was written. No additional interviews of Saabir Nurse took
20 place, and no additional report was drafted. In his testimony, SA Stewart Whitson
21 speculated that another interview may have been conducted after November 2015, but no
22 such interview occurred. (RT 3/3/16 118.)

23 The interview reports reveal Nurse permitted agents to look through his phone.
24 Nothing further came of that review, and the Government did not obtain a search warrant
25 for the phone. Similarly, the government did not obtain historical cell phone records for
26 Mr. Nurse's phone pursuant to 18 U.S.C. § 2703. However, cellular records of Elton
27 Simpson, Nadir Soofi and Abdul Malik Abdul Kareem were provided in September of
28 2015. Any record of Nurse's involvement or contact with Elton Simpson, Nadir Soofi

1 and Abdul Malik Abdul Kareem would have been encapsulated in the phone records of
2 the known co-conspirators in this case.

3 The fact that Nurse allowed agents to look through his phone and agents did not
4 obtain additional information relating to Nurse's use of the phone not only fails to
5 support Kareem's *Brady* claim, it gives rise to the inference that agents did not find
6 information that incriminated Nurse. Even if agents had found such information, it
7 would not necessarily have been exculpatory with respect to Kareem. The second
8 superseding indictment in this case made reference to known and unknown conspirators,
9 and the existence of other potential participants in the charged conspiracies does nothing
10 to negate the testimony of the witnesses who established Kareem's participation in the
11 conspiracies.

12 **3. James Bradley Bell**

13 Kareem alleges Mr. Bell apparently knew about the Mohammad Drawing contest
14 before Simpson went to Garland, Texas, and that by not disclosing recordings of Bell's
15 May 5, 2015, interviews until February 11, 2016, the government violated the Court's
16 *Brady* deadline.

17 Referring to Bell's statements as *Brady* material is a significant overstatement.
18 Whether Bell knew of the Garland attack in advance by virtue of having read one of
19 Simpson's tweets is not in any way exculpatory toward Kareem. The statement did not
20 become quasi-impeachment material until SA Whitson failed to recall that N.S. told him
21 he knew about the contest before it happened. Importantly, Bell's statement about having
22 seen Simpson's tweet about the contest was made to SAs Hemberg and Nolen, not
23 Whitson, so Whitson's misstatement was limited to his failure to recall NS's statement
24 and had nothing to do with Bell.

25 Moreover, the defense received Bell's statements in time to make use of them
26 during the trial. As previously noted, the government turned over the recordings on
27 February 11, 2016. The government turned over the reports, neither of which was
28

lengthy, on February 18, 2016. The defense began its case-in-chief on March 3, 2016, and rested on March 9, 2016, and therefore had ample time to subpoena Bell to testify.

4. John Sabari

Defendant did not request reports on John Sabari in this case. The government is disclosing three reports of interviews of John Sabari. The government has reviewed those reports, and none of them contains exculpatory material.

Based on the statements in the defendant's motion, Kareem's attorneys appear to have conducted extensive research into the 2010 case against Simpson and to have been well aware of events in that case and whatever connections Sabari had to it. Defense counsel referenced the earlier case against Simpson numerous times in the context of this case to argue the government was hounding Simpson after he received a sentence of probation and was seeking someone to blame after having failed to prevent Simpson and Soofi from going to Garland to conduct the attack. In light of this and the fact that Kareem himself provided information to investigators about Sabari during his May 5, 2015, interview, the defense knew of Sabari's ties to Simpson and Soofi. Specifically, the defense knew Simpson would speak to Jamaican cleric Sheikh Faisal via Skype at Sabari's home. Despite this, the defense chose to focus on the letter ostensibly written to Nurse and on attacking the credibility of government witnesses who testified under oath about having seen Kareem watch/play jihadist videos in their presence, having heard Kareem speak of plans to attack the Garland contest, and having heard Kareem speak of killing Kaffirs and/or strapping a bomb to himself to kill Kaffirs

E. The Government Did Not Knowingly Present Material False Testimony.

On March 3, 2016, Special Agent Whitson's third day of testimony, the defendant elicited the following testimony on cross examination:

Q: In this case we've heard from three witnesses so far that said they knew about the Muhammad Drawing Contest before it occurred. Would you agree with that?

A: Could you say that again?

1 Q: Yeah. We heard -- Mr. Verdugo said he had heard about the
2 Muhammad Drawing Contest before it occurred.

3 A: Yes.

4 Q: And the two juveniles, Carlos and Juan, both said they had
5 heard about that drawing contest before it occurred?

6 A: Yes.

7 Q: Okay. Did anyone else in your investigation, anyone tell
8 you that they had heard of that contest before it occurred
9 other than those two individuals -- those three individuals?

10 A: No, not that I recall.

11 Q: Do you recall whether or not Mr.-- the young boy in the
12 photograph indicated that he knew about the contest before

13 MS. BROOK: Objection. Hearsay as to any content of
14 conversations.

15 THE COURT: Sustained.

16 BY MR. MAYNARD:

17 Q: Okay. Did you participate in the preparation of the
18 indictments in this case?

19 (RT 3/3/16 Whitson at 134-135.)

20 Kareem claims the government violated *Napue v. Illinois*, 360 U.S. 264 (1959),
21 through a “presentation of false evidence” in that SA Whitson recalled that only “Stephen
22 Verdugo” and two juveniles “Juan and Carlos” had stated during the investigation to him
23 that they knew the drawing contest was to occur before it happened. To establish a *Napue*
24 violation, Kareem “must show” (1) Whitson’s testimony was “actually false,” (2) the
25 government “knew or should have known” it was false, and (3) it was “material,”
26 meaning there is a “reasonable likelihood” it “could have affected” the verdict. *United*
27 *States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011) (quotations omitted). Kareem
28 cannot make the required showing, for two reasons: the testimony was mistaken, not
perjured, and the inaccuracy was immaterial.

1 **1. The testimony was mistaken, not perjured.**

2 Absent prosecutorial machinations aimed at misleading the jury while averting
3 outright perjury—*i.e.*, abuses like the ones at the heart of the cases Kareem invokes —
4 honestly mistaken witness recollections do not ordinarily satisfy *Napue*’s falsehood
5 requirement. *Henry v. Ryan*, 720 F.3d 1073, 1084 (9th Cir. 2013).

6 SA Whitson agreed with Defense Counsel that Juan, Carlos and Mr. Verdugo
7 knew about the contest before it occurred. SA Whitson then answered “No, not that I
8 recall” to the question of did anyone else “tell him” about hearing of the contest before it
9 occurred. First, the question called for hearsay, which was objected to when Defense
10 counsel further questioned SA Whitson on the matter. Second, given the broad nature of
11 the questions, it is clear that in the moment, Whitson was mistaken and did not include
12 N.S. on his list of individuals. When asked about N.S.’s specific statements in the form of
13 a reference to a photo of the child, the Government objected to hearsay as to the content
14 of any conversations elicited. Defendant did not ask any more questions related to this
15 line of questioning and Defendant proved up the fact through N.S.

16 On March 4, 2016, N.S. testified in the defendant’s case. N.S. testified on direct
17 and on cross examination that his dad, Nadir Soofi, told him about the contest (the Draw
18 the Prophet Muhammad contest) before he died and that he learned about it as early as
19 February 2015. (Tr. T., pgs 7 & 12.) Further, defense asked N.S. if he had told SA
20 Whitson and the prosecutors (seated at the prosecution table) before trial “the same thing
21 that he had told us here today.” The witness testified “yes.” (RT 3/3/16 N.S. at 11.)

22 Q Did you go to their office two or three weeks ago and talk
23 to them?

24 A Yeah.

25 Q Did you tell them the same thing that you've told us
26 today?

27 A Yes.

28 (RT 3/3/16 N.S. at 11.)

1 SA Whitson testified and agreed that three individuals mentioned knowing of the
2 contest before it occurred. And that he did not “recall” others mentioning it. At best, this
3 misstatement was impeachment of SA Whitson’s memory. The defense has made no
4 showing of anything more than mistaken memory related to N.S..

5 Defendant in his motion also states “Mr. Bell informed FBI agents that he read
6 Simpson’s Twitter pages including Simpson’s tweets about ISIS and his tweet about the
7 cartoon contest and commented something to the effect of ‘these people will never
8 learn’... thus apparently Mr. Bell knew of the Mohammad drawing contest prior to the
9 attack in Garland.” (CR 303 at 11.) Kareem incorrectly assumes SA Whitson therefore
10 knew that Bell knew of the contest before it occurred. First, Bell’s statement did not
11 make clear whether he saw Simpson’s “will they ever learn” tweet before or after the
12 attack. Second, and more importantly, Bell’s statement about that particular tweet was in
13 his May 5, 2015, recorded interview with FBI SAs Theron Nolen and Clint Hemberg, but
14 was not included in their report of that interview. SA Whitson had not listened to the
15 recording of the Bell interview prior to the trial in this case, so he was not aware of Bell’s
16 knowledge of the tweet. (Exh. 11, Declaration of SA Whitson.)

17 SA Whitson’s statement came at the end of lengthy cross-examination. He
18 answered, “no, not that I can recall” in response to a question about whether anyone else
19 told him they knew of the contest before the attack. First, the question itself was
20 improperly seeking hearsay – an out of court statement offered for the truth of the matter
21 asserted. Second, the statement of Bell on this topic would have been double hearsay
22 because it would have come to SA Whitson from another agent’s report rather than an
23 interview Whitson conducted. Third, the response “not that I can recall” was truthful in
24 the moment—the jury rightly could conclude in response to the defense argument that SA
25 Whitson did not recall N.S. knew of the contest and plans to attack it or that Bell knew of
26 the contest via Simpson’s Twitter posts, and his failure to remember those facts was not
27 an attempt to deceive. This impeachment was insignificant in light of the evidence from
28 multiple sources showing Kareem discussed the contest with Simpson, Soofi and Abdul

1 Khabir Wahid, that he at some point planned to be part of the attack on the contest, that
2 he watched and played for others violent jihadist and/or Islamic State videos, that he
3 provided firearms to or assisted Simpson and Soofi in acquiring firearms and ammunition
4 they used in attempting to attack the Garland contest, and that he trained Simpson and
5 Soofi in the operation and maintenance of those firearms.

6 **2. The inaccuracy was immaterial.**

7
8 SA Whitson's failure to remember N.S. knew of the contest before it occurred
9 could not have affected the verdict, because the defense successfully impeached Whitson
10 on the subject through N.S.'s testimony that N.S. had told SA Whitson he knew of the
11 plan to attack the contest. In addition, defense used this misstatement to challenge SA
12 Whitson's credibility during closing arguments and the government did not argue during
13 rebuttal that Whitson was correct in his misstatement.

14 An inaccuracy must be material, and materiality depends on whether the defendant
15 "received a fair trial, understood as a trial resulting in a verdict worthy of confidence."
16 *Houston*, 648 F.3d at 814 (quotation omitted). Other circuits echo the same principle.
17 *See, e.g., United States v. Verser*, 916 F.2d 1268, 1271 (7th Cir. 1990) ("Under [*Napue*] a
18 conviction must be set aside if the prosecution's case includes perjured testimony, the
19 prosecution knew or should have known of the perjury, and there is any reasonable
20 likelihood that the false testimony could have affected the judgment of the jury. ...
21 However, not every testimonial inconsistency that goes uncorrected by the Government
22 establishes a constitutional violation."); *United States v. Griley*, 814 F.2d 967, 971 (4th
23 Cir. 1987) ("[a] defendant seeking to vacate a conviction based on perjured testimony
24 must show that the testimony was, indeed, perjured. Mere inconsistencies in testimony by
25 Government witnesses do not establish the Government's knowing use of false
26 testimony."). Taken together, *Verser* and *Griley* confirm at a minimum that in order for a
27 *Napue* violation involving testimony to exist, (1) the witness must know that his or her
28 testimony is false; (2) the burden for establishing that fact lies with the defendant; and (3)
it does not suffice if the witness is merely mistaken or incorrect.

1 Kareem's reliance on *United States v. LaPage*, 231 F.3d 488, 490 (9th Cir. 2000)
2 is mistaken. In *LaPage*, the prosecutor elicited testimony that was plainly incorrect. The
3 witness testified under oath during an earlier trial that he did *not* recognize a particular
4 person, and then in a later trial testified that he *did* recognize her in the earlier trial, and
5 had identified her at the earlier hearing. The court found the prosecutor plainly knew the
6 testimony was false because the matter was important and the same prosecutor tried the
7 case both times. *Id.* at 490. Kareem's reliance on *United States v. Kojayan*, 8 F.3d 1315,
8 1318 (9th Cir. 1993), likewise is misplaced. In *Kojayan*, the AUSA was found by the
9 Ninth Circuit to have made untruthful arguments and statements in rebuttal that were not
10 based on the facts in evidence in the case and further in contrast to information that
11 should have been disclosed to defense.

12 Because SA Whitson's testimony on this subject was merely mistaken and defense
13 counsel effectively impeached it with the testimony of N.S., no *Napue* violation occurred.

14 **F. Conclusion**

15 Case law makes clear that a continuance is the appropriate remedy in this
16 circumstance. The law is equally clear that a Defendant cannot sit back on the receipt of
17 new discovery, make a tactical choice not to object and hope for an acquittal, and then
18 demand a new trial once that choice fails to yield the desired outcome.

19 For all of these reasons, Kareem's motion should be denied.

20 Respectfully submitted this 3rd day of May, 2016.

21 JOHN S. LEONARDO
22 United States Attorney
District of Arizona

23 *s/Kristen Brook*
24 *s/Joseph E. Koehler*
KRISTEN BROOK
JOSEPH E. KOEHLER
25 Assistant U.S. Attorneys
26
27
28

1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 3rd day of May, 2016, I electronically filed the foregoing with
3 the Clerk of Court using the CM/ECF system, and that true and accurate copies have been
4 transmitted electronically to counsel for the defendant via the ECF system.

5 Daniel Maynard, Attorney for Defendant

6 By: /s Kristen Brook
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28